MOTION FILED
FEB 15 1984

No. 83-1166

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL SILVER
and
DONALD W. PARKER,
Petitioners

v.

JOHN C. BENSON, JR., et al.,
Respondents

On Petition for Writ of Certiorari to the Commonwealth Court of Pennsylvania.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

AND

BRIEF OF PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS AND NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS AS AMICI CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

1. The Applicant, Pennsylvania State Association of Township Supervisors ("PSATS"), is an unincorporated association authorized under the laws of Pennsylvania to foster and represent the interests of township supervisors and townships of the second class in Pennsylvania. There are 1,458 townships of the second class in Pennsylvania, of which more than 1,450, including the township served by Petitioners, are members of the Pennsylvania State Association of Township Supervisors.

2. The disposition of the instant case will have a substantial and direct impact upon the conduct of government by the townships represented by PSATS. Although involved here is the surcharge of individual township supervisors for money expended in connection with lobbying, the overriding effect and impact of the lower court's decision is to oppress the free speech of the township government for which the individuals were speaking. Accordingly, whether or not townships and municipalities throughout Pennsylvania will be free in the future to lobby or to participate in other aspects of free speech, hinges upon a decision by This Honorable Court to review and rule upon the First Amendment issues contained in this case. Therefore, the Association, on behalf of the townships it represents and all similarly situated municipal governments, asserts a valid interest in the instant case.

3. The Applicant, National Association of Towns and Townships ("NATaT"), is an unincorporated association having offices at 1522 K Street, NW, Suite 730, Washington D.C. NATaT represents the interests of member towns, townships, villages and boroughs at the national level, and its membership consists of state organizations, such as PSATS. NATaT asserts essentially the same basis of interest as the Association, except its interest is much broader. If the instant case passes unreviewed by this Court, there is great potential for

other states, like Pennsylvania, to silence the speech of their municipalities.

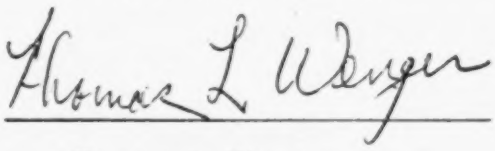
4. The question presented in the instant case, simply stated, involves the relationship of the First Amendment to municipal speech. Although the briefs of the parties in the court below have addressed this relationship, their discussions are incomplete in that they did not adequately address the lower court's failure to apply the correct test to determine whether a restriction of First Amendment rights is warranted; they inadequately discussed the subissue of whether a constitutional right can be denied by inference as opposed to explicit legislative mandate; they fail to emphasize the significance of this case as a case of first impression before the Supreme Court of the United States; and they fail to adequately describe the full impact of the decision of the Commonwealth Court of Pennsylvania, which impact can be most readily understood through towns and townships themselves, speaking through PSATS and NATaT in the within brief. Further, Applicants have no reason to believe that these arguments on these points will be expanded and made complete in this Court. If Applicants' arguments are approved by this Court, the decision of the court below must be reversed.

5. The consent of Petitioners, Silver and Parker, to filing of the enclosed Brief by Amici was obtained. The consent of Respondents, Benson, et al., was declined.

CONCLUSION

For the above stated reasons, we respectfully request leave of this Court to file the attached brief, amici curiae.

Respectfully submitted,



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QUESTION PRESENTED

Whether communications, in the form of lobbying, by a municipal government to a state legislature concerning proposed legislation that directly affects the government and citizens of the municipality are a form of speech worthy of protection under the First Amendment to the Constitution of the United States in the absence of a statutory authorization for such form of speech.

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INTERESTS OF AMICI CURIAE

The interests of *Amici Curiae* are set out in the Motion for Leave to File, *supra* paras. 1-3.

SUMMARY OF ARGUMENT

The issue before the Court presents a federal constitutional issue of substantial importance. This Court has identified the form of speech here involved, i.e., a discussion of governmental affairs, as a type of speech worthy of protection. The lower court decision from which this appeal is taken would effectively prohibit or impair such a discussion.

The eligibility of a form of speech for protection under the First Amendment depends primarily on the content of the speech and its potential value to the hearer and society, not the source of the speech or the nature of the speaker. A strong and compelling countervailing interest must be shown to deprive the speech involved of the constitutional protection to which it would be otherwise entitled. The above principles have been clearly enunciated by this Court and are of controlling importance in the proper determination of the instant case, but were not applied by the lower court. Rather, the lower court applied an improper standard which, if left unreviewed, contains capacity for great harm to the principles of free speech and the conduct of municipal government.

The review sought here is also supported by the fact that the precise issue presented has not been previously addressed by this Court.

ARGUMENT

I. THE CASE AT BAR PRESENTS A SUBSTANTIAL FEDERAL QUESTION.

A. *The lower court denied a municipal government the right to free expression in a manner contrary to the principles and standards enunciated by this Court in First National Bank of Boston v. Bellotti.*

The instant appeal is from a lower court's holding that a municipal government lacked the power to communicate (i.e., lobby) its interest in certain legislation to the state legislature. The apparent sole basis for the decision was that the applicable statute did not expressly or by clear implication authorize communication by the municipal government to the state government. Any restraint upon the free exchange of ideas in our society instantly raises the issue of whether freedom of speech, so jealously protected under the First Amendment to the constitution of the United States, U.S. Cons., Amend. I, has been abridged. Facially, therefore, the case presents a clear and important federal constitutional question.

Not every case containing a constitutional issue presents an issue of sufficient gravity and importance to warrant consideration and disposition by this Court. A second level of inquiry therefore is required to assess the significance of the constitutional issue. This second level of inquiry encountered concerns whether there is any element in the nature of the speech, the speaker, or the circumstances that surround the controversy, that affects the constitutional right asserted in such a way as to reduce or negate the importance of the federal question involved. Thus, is the speech involved worthy of First Amendment protection? If so, is there present in the case a countervailing element or principle that outweighs the protection to which the speech would otherwise be entitled?

This Court has not dealt conclusively with the specific issue presented by Petitioners, but it has approached this subject matter on two occasions. In the first, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), this Court accepted the appeal, and in its decision, clearly confirmed the great importance attached to the preservation of a free discussion of the affairs of government. Further, the court laid down standards by which the interests of free speech in governmental affairs and the interests of restraint may be weighed against each other. In the second case, *Anderson v. City of Boston*, 376 Mass. 178, 380 N.E.2d 628 (1978), *appeal dismissed*, 439 U.S. 1060 (1979), this Court refused to hear an appeal for want of a substantial federal question. But the distinctions between *Anderson* and the instant case strike such a sharp contrast as to illuminate the importance of Petitoners' appeal and the constitutional issue involved. Both cases bear closer examination.

In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), a Massachusetts statute forbade corporations involved in certain types of businesses "from making contributions or expenditures 'for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.'" *Bellotti*, 435 U.S. 765, 768, (*quoting* MASS. GEN. LAWS ANN., Ch. 55 §8 (West Supp. 1977)). This Court struck down the statute as an unconstitutional abridgment of the right of free speech.

Bellotti is obviously distinguishable from the instant case in that it involved a business corporation entity as the speaker, the public as the hearer, a referendum as the object of the speech and an express statutory prohibition as the purported bar to the speech. The counterpart elements here are a municipal governmental entity, the state legislature, a proposed legislative act and statutory silence as to the right to speak. But these distinc-

tions do not detract from the applicability of the Court's analysis to the instant case. Much of the Court's opinion in *Bellotti* resonates strongly in the case at bar and throws grave doubt upon the action of the lower court. Further, the opinion clearly confirms the importance attached to the preservation of free communication concerning governmental affairs.

> '[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech.

Bellotti, 435 U.S. 765, 776-777 (1978) (*quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

Just so. In the instant case, there could be no serious suggestion that the form of speech be restrained if made by an individual rather than a governmental entity.

The majority opinion defined the context in which First Amendment issues of this nature are to be weighed. Justice Powell speaking for the majority said:

> The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether §8 abridges expression that the First Amendment was meant to protect. We hold that it does.

Belotti, 435 U.S. 765, 776 (1978).

Thus, it is the content of the speech, not the nature of the speaker, that determines whether First Amendment protection is afforded. Further, at page 777, the Court said: "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."

Bellotti, 435 U.S. 765, 777 (1978).

It is submitted as clear beyond question that the type of speech involved in the instant case is, in fact, a form of discussion of governmental affairs, the protection of which is a major purpose of the First Amendment. The prohibition of such a discussion is an action of such restrictive and chilling effect as to present a clear federal constitutional issue that demands the scrutiny of this Court.

Satisfied that the speech involved warranted First Amendment protection, the *Bellotti* court asked whether there was any element in the nature of the speaker that effectively deprived it of its entitlement to the protection of the First Amendment. In the course of that inquiry, the Court made the following observations that are readily transported to the instant controversy. The Court discarded the idea that creatures of the state have only the powers granted to them by the state as being extreme and irreconcilable with a wealth of decisional law. "[T]he States are [not] free to define the rights of their creatures without constitutional limit."

Bellotti, 435 U.S. 765, 779 n. 14 (1978).

And again, at page 780, the Court said: "[T]he States do not have greater latitude than Congress to abridge freedom of speech."

Bellotti, 435 U.S. 765, 780 n. 16 (1978).

At pages 784 and 785, the Court said: "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."

Bellotti, 435 U.S. 765, 784-785 (1978).

A further test set forth in *Bellotti* for determining whether a state-imposed restriction on free speech can be upheld was stated as follows:

> [W]here, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling, ...'

Bellotti, 435 U.S. 765, 786 (1978) (*citations omitted*).

In the instant case, the lower court did not find, or even seek, any counterbalancing interest that justified the court's denial of free speech by the municipal government. In fact, the lower court made no inquiry into either of the standards described above.

The second case bearing relevance to the instant one to have come before the United States Supreme Court is *Anderson v. City of Boston*, 376 Mass. 178, 380 N.E.2d 628 (1978), *appeal dismissed*, 439 U.S. 1060 (1979). There, a statute was challenged that barred a municipal government from expending public funds to speak as a partisan advocate in a general election. The lower court upheld the statute, and this Court refused the appeal of the city because it found no substantial federal question. The *Anderson* case is clearly distinguished from the present case.

First, the lower court in *Anderson* scrupulously applied the tests enunciated by this Court in *Bellotti*. The lower court in the case at bar applied no similar tests.

Second, the *Anderson* lower court acknowledged the existence of the municipality's First Amendment rights as valid and controlling unless counterbalanced by a compelling state interest. The lower court here held implicitly that such rights do not exist.

Third, in *Bellotti*, there existed a counterbalancing interest in the form of an express statutory restraint and a clearly perceptible underlying basis for the restraint. In the instant case, neither of these factors is present.

Fourth, the form and content of the speech in *Bellotti* were of a sort that was susceptible to being counterbalanced and outweighed. That is, it involved

the partisan participation of a governmental body in a general election; an activity that might well cast doubt upon the fairness of the election. In contrast, the instant case involves a form of speech that was identified by this Court in *Bellotti* as being worthy of constitutional protection, i.e., a discussion of governmental affairs. The lower court in *Anderson*, even while upholding a statutory restraint upon free speech by a municipal government, recognized a clear distinction between the issue before it and communication by a municipal government concerning legislation.

> We are not concerned here with the First Amendment or other right of a municipality to expend public funds to influence legislative action. Municipal action concerning legislation has statutory, traditional, and constitutional foundations which are not applicable to municipal action on questions submitted to the people.

Anderson, 380 N.E.2d 628, 635 n. 11 (1978).

We respectfully submit that this Court's action in *Anderson* is not a basis for rejecting Petitioners' plea in the instant case. On the contrary, the patent distinctions between Petitioners' case and the decision in *Anderson* serve to underline the need for disposition by Your Honorable Court of the specific issue here presented. We further submit that the *Bellotti* and *Anderson* decisions clearly show the constitutional importance of the issue here involved and the need for specific consideration and decision by this Court.

B. *The lower court applied a wrong test to determine this case.*

It is clear beyond doubt that the action of the Court below constituted a restraint upon free speech. Whether or not the restraint is ultimately deemed constitutionally valid, it is imperative that the issue be determined in ac-

cordance with the tests and standards that this Court has established and described. To permit divergence from those standards is to lose more than mere predictability. In the instant case, for example, the lower court, without paying so much as a nod of recognition to the guidelines set forth by this Court in *Bellotti*, would deprive not only the township government, but also the citizens of the township, the state legislature and the society at large of the fruits that might result from a free flow of ideas from the township to the state legislature concerning governmental affairs, specifically litigation in which the township is legitimately interested.

We assert that the lower court applied a wrong test in determining the instant case on the basis of a statutory silence. It merely asked, "Does the statute authorize this kind of speech?" In the absence of express or clearly implied statutory authorization, it held that no right to speak to the state legislature existed in the municipal government. The lower court did not inquire into the worthiness or content of the speech or the importance of the form of speech as a source of information to the state legislature; nor did its decision depend upon an over-riding legislative prohibition; nor did it find a counterbalancing interest or right that justified the restraint imposed. Rather, the sole basis for the lower court's decision appears to be the premise that legislatively-created entities such as townships have no constitutionally-protected rights, except to the degree that such rights are accorded to them by the creating legislature. The premise itself is internally flawed since the states lack power to withhold rights guaranteed by the federal constitution. U.S. Cons. Amend. XIV, §1. Further, it seems highly improbable that the legislature intended to insulate itself from input and communications from local governments throughout the state.

More important for purposes of the present discussion, however, is the fact that the lower court's basis for analyzing and determining the case differs wholly from

the standards and tests established by this Court. We urge this Honorable Court to recognize that to permit the continued existence and perpetuation of the lower court's test in this case would be a serious abridgment of the standards set forth in *Bellotti*, and a host of other decisions of this Court, and would inevitably lead to wider incursions upon the constitutional rights of entities whose origin and nature are dependent upon legislative act.

C. The instant case is one of first impression.

The precise issue presented here is whether lobbying efforts by a municipal government to a state government constitute a form of speech protected by the federal Constitution. The lower court held they are not protected, even though there exists no statutory prohibition against such communications, and even though no counterbalancing interest has been shown to warrant the prohibition.

The case of *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), discussed at length above, extensively addresses principles and considerations that bear directly upon the instant case. But there are critical distinctions which leave the *Bellotti* answers short of the question here presented. Primary among these is the fact that *Bellotti* involved a creature of statute, but a private business corporation, rather than a governmental entity that is admittedly an agency of the sovereign state government. Contained within the instant case, therefore, is the issue of whether such an agency of the state, once created, has an identity separate from that of the state government. It is commonly recognized that such municipal governments are subject to complete control of the state, including the power to create, alter and destroy. *Hunter v. Pittsburgh*, 207 U.S. 161, 178-179 (1907). It is not clear, however, that such an agency, during the term of its existence, has no separate identity

and is entitled to no constitutional protections other than the ones expressly accorded to it by the creating legislature.

Similarly, this Court's disposition of *Anderson v. City of Boston*, 376 Mass. 178, 380 N.E.2d 628 (1978), *appeal dismissed*, 439 U.S. 1060 (1979), fails to supply an answer to the instant controversy. The distinguishing factors in *Anderson* were that it involved a specific statutory prohibition against the form of speech involved and the entitlement to First Amendment protection was opposed by a strong counterbalancing interest in that the form of speech entailed partisan participation by a governmental entity in a general election. The lower court in *Anderson* recognized the absence of authority in this general area of the law. *Anderson v. City of Boston*, 376 Mass. 178, _____, 380 N.E.2d 628, 635 (1978). The many points of divergence between this appeal and *Anderson* negatives any claim that *Anderson* is controlling precedent in the instant case.

We respectfully submit that, in the absence of prior authority, and in view of the importance of the issue involved, the instant appeal warrants the consideration and decision of this Court.

D. The disposition of this case will have a substantial impact and application far beyond its effect upon the parties to the action.

There are in Pennsylvania 1,458 townships of the second class. These are municipal governments exactly like the one represented by Petitioners. Additionally, there are more than 1,000 other municipal governments in Pennsylvania, consisting of townships of the first class, boroughs, cities and an incorporated town. Each of these is subject to a statute that is identical or substantially similar in relevant part to the one that governs the Petitioners' township. The outcome of the instant case, therefore, will affect directly and substantially the conduct of government in each of these municipalities.

The potential effect of the decision in this case, of course, is multiplied if extended to the municipal governments of Pennsylvania's sister states.

Nor is the impact of the case likely to be limited to communications to the state legislature. The conduct of municipal government involves frequent transactions and communications between the municipal government and various departments and agencies of the state. Few of these necessary transactions are sanctified by express statutory authorization. The rule of the lower court in the instant case, therefore, would silence speech by municipal governments, not only to their state legislature, but also to every state department or agency with respect to which there is no statutorily authorized power of communication.

The chilling and restrictive effect of the lower court's rationale may not be limited to communications to state government, but by logical extension, may apply to any form of speech contemplated by officials of a municipal government. It is important to note that under the decision of the lower court, the fact that communication served a legitimate and substantial township interest provided no protection to the officials and no authority for the form of speech. Rather, the court simply looked to the governing statute and held that if the power to speak is not clearly given in the statute, then the power to speak does not exist.

We believe the rule of the lower court here is monumentally oppressive. Its necessary effect, if left intact, is to absolutely prevent the flow and exchange of ideas from municipal government to the state legislature and to chill and impede virtually every form of communication emanating from municipal governments. Such a result seems strikingly contrary to the rule described in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), where this Court said that the flow of free speech concerning affairs of government is one of the

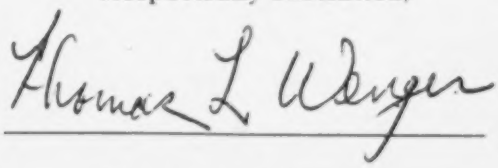
forms of speech most deserving of protection and preservation by the First Amendment to the Constitution.

The immense impact of this case, not only in terms of its holding, but also in terms of the rationale employed by the lower court to reach the holding, supports the need for consideration and disposition of the issues involved by this Court.

CONCLUSION

According to this Court in *First National Bank of Boston v. Bellotti*, First Amendment protection depends upon the type of speech, not its source. State restriction of protected speech is only supportable if based on compelling state interests. By failing to recognize these well-founded premises, and by finding a prohibition against full discussion of governmental affairs in a statutory silence, the lower court has presented this Supreme Court with a significant case of first impression. States are currently without guidance as to the relationship of the First Amendment to municipal entities. The decision of the lower court will fill that void by effectively silencing local governments, unless this Court chooses to review the issue at hand. Accordingly, the *Amici Curiae* respectfully request that this Honorable Court grant Petitioners' request for Writ of Certiorari to the Commonwealth Court of Pennsylvnia.

Respectfully submitted,



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